Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 11, 1991

Mr. Dan LaFleur
Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR91-081

Dear Mr. LaFleur:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your most recent correspondence to this office was assigned ID# 11433.

The Texas Department of Health (hereafter, the department) received a request for "all information you may have regarding a recent investigation" of alleged improper activities by the chief of the Respiratory Therapy Unit of the San Antonio State Chest Hospital (hereafter, the hospital). In the department's original request for an open records decision it was asserted that the information in question comes under the protection of sections 3(a)(1) and 3(a)(11) of the Open Records Act. This office subsequently notified you by correspondence dated March 1, 1990, that unless you identified specific portions of the investigation report as coming under the protection of specific exceptions the entire report must be released. A substantial amount of time passed without this office receiving your response. Consequently, on December 19, 1990, this office declared that the report was deemed to be public in its entirety.

Upon your receipt of the December 19 ruling, you asserted to this office that the department never received our March 1 letter and asked for reconsideration of our ruling. In light of these developments, this office withdraws its ruling of December 19, which is now superseded by this open records ruling.

In further correspondence with this office dated January 3, 1991, you ask that this office also consider the applicability of section 3(a)(3) to the investigation report

because "[s]ince the time that the Department submitted the request for an ORD to your office, the information being requested has become involved in litigation in which the Department of Health is a party." A previous determination of this office, Open Records Decision No. 515 (1988) at 6, governs this aspect of your request. In Open Records Decision No. 515, this office held that when a governmental body seeks reconsideration of a decision of the attorney general, the governmental body cannot raise exceptions not raised in its initial request without showing compelling reasons for withholding the information and for raising additional exceptions; to allow otherwise would allow the governmental body to delay releasing public information indefinitely.

Although this office is unaware of the date on which the department was served notice of claim with regard to pending lawsuit, we note that the initial complaint was filed in federal district court on October 30, 1990, over two months before the department raised the section 3(a)(3) exception. Because of the Open Records Act's emphasis on the timely production of public records, see id. and citations therein, governmental bodies have the affirmative duty to supplement their requests for open records decisions in a timely manner. The department has not done so in this instance. Consequently, this office will not consider your section 3(a)(3) claim.

We now proceed to the other issues you have raised. You inquire whether the requestor, an attorney representing the subject of the investigation, has a special right of access to the investigation report. In Open Records Decision No. 288 (1981) this office determined that public employees have no greater right of access to the contents of their personnel files than that of the general public. But see Attorney General Opinion JM-119 (1983) (public officials have special right of access to documents necessary for the carrying out of their official duties). Although a governmental body may choose to release certain information to its employees without necessarily waiving the right to withhold the same information from the public, see, e.g. Open Records Decision 464 (1987), the hospital apparently has chosen not to release the requested information in this instance. Consequently, the current request must be considered in the same posture as a request from a member of the general public made pursuant to the Open Records Act.

You contend that complaints filed against the subject of the investigation come under the protection of the

informer's privilege. In Roviaro v. United States, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law [citations omitted]. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. (Emphasis added.)

The protection of the informer's privilege extends only to those who report the violation of criminal laws or civil laws that carry quasi-criminal penalties, Open Records Decision No. 515; the civil statutes you have cited as having been violated do not carry criminal or quasi-criminal penalties and you have not demonstrated that the hospital has reported any criminal wrongdoing to the appropriate authorities. The privilege does not apply to employees "reporting" to their employers about the job performance of other employees. Id. The informer's privilege is inapplicable in this instance.

Although the attorney general will not ordinarily raise additional arguments as to how an exception might apply, see Open Records Decision Nos. 455 (1987); 325 (1982), we will raise additional arguments under section 3(a)(1) because the release of confidential information could impair the rights of third parties and because its improper release constitutes a misdemeanor. See V.T.C.S. art. 6252-17a, § 10(e). The investigation report contains the names of respiratory patients that should be withheld to protect those individuals' privacy rights. Cf. Open Records Decision No. 455 (information pertaining to recent illnesses and operations of applicants for public employment protected by common-law privacy). You must also withhold all medical records, as defined in section 5.08(b) of V.T.C.S. article 4495b.

You also contend that the report comes under the protection of section 3(a)(11). Section 3(a)(11) of the act

excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's deliberative process. Open Records Decision No. 464 (1987). Section 3(a)(11) does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 450 (1986). If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). We have marked those portions of the investigation report that you may withhold pursuant to section 3(a)(11). Please note, however, that section 3(a)(11) is a permissive exception; you are not required to withhold information that comes under the protection of this section. The remaining portions of the report must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-081.

Yours very truly,

Steve Aragon
Assistant Attorney General
Opinion Committee

SA/RWP/le

Ref.: ID# 11433
ID# 11396
ID# 7844

Enclosures: Open Records Decision No. 515
Marked documents

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